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UNITED STATES DISTRICT COURT
 DISTRICT OF HAWAII

DENNIS CLAYPOOL, individually and as Guardian Ad Litem for KRISTEN CLAYPOOL, a minor, SHERYL CLAYPOOL, SCOTT CLAYPOOL, and KRISTEN CLAYPOOL,)	Civil No. CV04 00570 HG-BMK
Plaintiffs,)	MEMORANDUM OF POINTS AND AUTHORITIES IN RESPONSE TO MARKEL INTERNATIONAL INSURANCE CO.'S MOTION TO INTERVENE AS A PARTY DEFENDANT; CERTIFICATE OF SERVICE
vs.)	
CAPTAIN ANDY'S SAILING, INC., BLUE DOLPHIN CHARTERS, LTD., and BLUE DOLPHIN DIVING, INC.,)	
DefendantS)	

MATTHEW ISHAM, individually
and as Guardian ad Litem for
HAYDEN ISHAM, a minor;
ROXANNE BEST ISHAM,
Plaintiffs,
vs.
BLUE DOLPHIN CHARTERS,
LTD. and BLUE DOLPHIN
DIVING, LTD., CAPTAIN ANDY'S
SAILING, INC.,
Defendants.

IN THE MATTER OF THE) Civil No. CV05 00037 HG BMK
COMPLAINT OF BLUE DOLPHIN)
CHARTERS, LTD. AND TERRY)
DONNELLY, AS OWNERS OF THE)
VESSEL M/V BLUE DOLPHIN,)
O/N 1082213, FOR EXONERATION)
FROM AND/OR LIMITATION OF)
LIABILITY)
)
)
)
)

**MEMORANDUM OF POINTS AND AUTHORITIES IN RESPONSE TO
MARKEL INTERNATIONAL INSURANCE CO.'S MOTION TO INTERVENE
AS A PARTY DEFENDANT**

Whatever the motion to intervene may suggest, we are not asking this Court for

a post-judgment finding similar to the one Your Honor made in *Weber v. Pacific Indemnity Insurance Co.*, 345 F.Supp.2d 1139 (D. Haw, 2004) in order to bar the Markel International Insurance Co. (“Markel”) from challenging that judgment in the collateral declaratory relief action which Markel has already filed before Judge Gillmor (Action No. CV05-00673). Nor can we accept the overwrought assertion that unless Markel is allowed to intervene in this suit, “it eventually could be estopped from challenging the reasonableness of the amount of the judgment agreed to by the Claypools and Blue Dolphin.” *Memorandum in Support of Motion* at 2. These arguments either misstate or misconstrue the legal principles that will control the determination of that declaratory relief action. See, e.g., *Sentinel Ins. Co. v. First Ins. Co.*, 76 Haw. 277, 296-97 (1994).

Be that as it may, the Claypools and BDC have no objection to Markel’s intervention. Indeed, BDC requested Markel’s intervention and assistance in this case way back in the Spring of 2005, but the insurer declined BDC’s invitation and refused to defend this case. See *Exhibit A.4 (May 25, 2005 letter from Bernard Rice to Terry Donnelly)*. As everyone knows:

[T]he insurer that refuses to defend does so at its own peril. For example, the insurer forfeits any right to control the defense costs and strategy, including the right to compel the insured's cooperation in the defense of the claims; if it loses its claim of no duty to defend, it will be obliged to reimburse the insured for all reasonable defense fees and costs properly incurred. *Additionally, the breaching insurer waives its right to approve of any settlement.* Under such circumstances, the insured is entitled to negotiate a reasonable and good faith settlement of the underlying claim which amount may then be utilized as presumptive evidence of the breaching insurer's liability. Thus, by refusing to provide a defense, the insurer risks liability for a settlement in an amount that,

although reasonable, could be higher than it might have been able to secure.

Sentinel Ins. Co., 76 Haw. at 296 (citations omitted). That, of course, is why Markel is so anxious to be heard on Plaintiff's Motion for Approval of Good Faith Settlement. We anticipated that anxiety. That is why we served Markel with a copy of BDC's and the Claypool's motion way back on April 5, 2006, when we originally filed it. Far from objecting to the carrier's request for intervention, we cannot imagine why it waited so long to ask.

Dated: May 30, 2006

HAROLD G. HOPPE and
McGUINN, HILLSMAN & PALEFSKY
Attorneys for Plaintiffs Dennis Claypool,
Sheryl Claypool, Scott Claypool and
Kristen Claypool

By: /s/ Harold G. Hoppe
HAROLD G. HOPPE

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UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

DENNIS CLAYPOOL, individually and as) Civil No. CV04 00570 HG- BMK
Guardian Ad Litem for KRISTEN)
CLAYPOOL, a minor,)
SHERYL CLAYPOOL, SCOTT)
CLAYPOOL, and KRISTEN)
CLAYPOOL,)
Plaintiffs,)
vs.)
CAPTAIN ANDY'S SAILING, INC., BLUE)
DOLPHIN CHARTERS, LTD. and BLUE)
DOLPHIN DIVING, INC.,)
Defendants.)

MATTHEW ISHAM, individually) CIVIL NO. CV04-00559 HG-BMK
and as Guardian ad Litem for)
HAYDEN ISHAM, a minor;)
ROXANNE BEST ISHAM,)
Plaintiffs,)
vs.)
BLUE DOLPHIN CHARTERS,)
LTD. and BLUE DOLPHIN)
DIVING, LTD., CAPTAIN)
ANDY'S SAILING, INC.,)
Defendants.)

IN THE MATTER OF THE) Civil No. CV05-00037 HG BMK
COMPLAINT OF BLUE DOLPHIN)
CHARTERS, LTD. AND TERRY)
DONNELLY, AS OWNERS OF)
THE VESSEL M/V BLUE)
DOLPHIN, O/N 1082212, FOR)
EXONORATION FROM AND/OR)
LIMITATION OF LIABILITY)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the date last written below, I served a true and correct copy of the foregoing document on the following as indicated below:

1 st Class U.S. Mail	John R. Lacy Randy L.M. Baldemor GOODSILL ANDERSON QUINN & STIFEL Alii Place 1099 Alakea St. Suite 1800 Honolulu, HI 96813	Blue Dolphin Charters
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1 st Class U.S. Mail	Robert Miller Law Offices of Robert Miller 735 Bishop St., Suite 500	Blue Dolphin Charters, Inc.
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Honolulu, HI 96813

1st Class
U.S. Mail

Stephen C. Smith
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ASB Tower
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Honolulu, HI 96813

Markel Insurance

Dated: May 30, 2006

HAROLD G. HOPPE and
McGUINN, HILLSMAN & PALEFSKY
Attorneys for Plaintiffs Dennis Claypool,
Sheryl Claypool, Scott Claypool and
Kristen Claypool

By: /s/ Harold G. Hoppe
HAROLD G. HOPPE